92-1409

SUPREME COURT, U.S.
FILED
NOV 5 1993
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT

of the

UNITED STATES

Myron Curtis Gackenbach, Esquire
Petitioner

vs.

Uniroyal, Inc.,
Respondent

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

David L. Masenheimer, Esquire
110-112 North Sixth Street
P. O. Box 449
Allentown, PA 18105
(215) 432-4506

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Petitioner has stated special or important reasons for granting Writ of Certiorari where his actions to enforce an oral contract is barred by the statute of frauds.

2. Whether Petitioner's inaction in response to the alleged oral modification of the contract constitutes significant and substantial reliance unequivocally referable to the oral modification.

PARTIES

Respondent adopts the statement of the parties found in Petitioner's Petition pursuant to U.S. Supreme Court Rule 2d, Uniroyal Inc., is the predacessor of Uniroyal Chemical, Inc., a wholly owned subsidiary of UCC Investors Holding, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 8

Summary of Argument I.

Petitioner has not alleged any special or important reason of the character enunciated in Rule 10 of the Rules of the Supreme Court of the United States for granting of the Writ.

Summary of Argument II.

Following the alleged oral modification of the two-year written agreement petition, took no action whatsoever in reliance upon the alleged oral modification. A failure to act, when no action is required, cannot indicate significant and substantial reliance

unequivocally referable to the alleged oral modification. Hence, summary judgment was appropriately granted.

TABLE OF AUTHORITIES

Anderson vs. Liberty Lobbin, Inc., 477 U.S. 242 (1986) 12

Federal Rule of Civil Procedure No. 56 11

N.Y. General Oblig. law, §15-301(1) (McKinney, 1991) 13

Rose vs. Spa Realty Associates, 366 N.E. 2d 1279, (1977) 13

Towers Charter and Marine vs. Cadillac Insurance Company, 894 F.2d 516 (2d Cir. 1990) 13

OPINIONS BELOW

Respondent adopts the opinions below found in Petitioner's Petition found at Appendix "A" and "B."

JURISDICTION

Jurisdiction was based on diversity of citizenship. A panel of the Third Circuit Court of Appeals upheld the decision of the United States District Court for the Eastern District to Pennsylvania and denied rehearing on November 9, 1992. The Petitioner filed a Petition for a Writ of Certiorari on or about February 3, 1993. Petitioner served his Petition upon Respondent on or about February 9, 1993. This Brief in Response is filed within the thirty days from receipt of the Petition as provided by U.S. Supreme Court 15.

STATEMENT OF THE CASE

Petitioner Gackenbach commenced an action in breach of contract alleging that he

is entitled to finder's fee commissions as a result of a written contract entered into with Uniroyal on January 26, 1984. The contract provided for payment of a percentage of consideration paid by Uniroyal in acquiring any company or part thereof as a direct result of information provided to it by Petitioner via a Notice of Prospect. The agreement further provided that the fee was payable to Petitioner only if the acquisition of any prospect was consummated within twenty-four months after the date of the Notice of Prospect. The agreement also provided that the writing constituted the entire agreement between the parties relating to the subject matter and that no prior or concurrent representations, understandings or agreements, whether written or oral would be binding on either party. Moreover, no change, waiver, modification, alteration or addition to any provision would be binding on the parties unless in writing and signed by

the designated representative of both parties. The Petitioner executed the agreement on May 9, 1984. At that time, Petitioner presented Uniroyal with a Notice of Prospect of several companies, including Kalo Company of Kansas City. On May 21, 1984, Uniroyal advised Petitioner of its interest in the Kalo Company. In February of 1985, representatives of Uniroyal met with representatives of Kalo Company. However, Uniroyal did not acquire Kalo Company. Later in 1986, Uniroyal was liquidated. Subsequently, on December 3, 1986, Gustafson, Inc., a subsidiary of Uniroyal Chemical Company, Inc., acquired the seed treatment product line from Kalo Company. This portion of the Kalo Company business which was acquired by Gustafson, was originally identified by Gustafson itself. The acquisition did not occur as the direct result of information provided by Petitioner. Significantly, the acquisition by a Uniroyal

subsidiary of a company identified by Petitioner, did not occur within the twenty-four month period following the Notice of Prospect as set forth in Petitioner's agreement.

Petitioner alleges that a representative of Uniroyal orally extended the twenty-four month period during which the Kalo acquisition needed to completed in order for a finder's fee to be due.

After comprehensive discovery, Petitioner has not produced any writing modifying the original agreement. Petitioner did nothing until 1989 when he first discovered that Gustafson had acquired Kalo. At that time, he sought a commission on the acquisition.

In response to Petitioner's claim for a commission, Uniroyal asserted that the acquisition was not consummated within the twenty-four month period provided in Petitioner's agreement. Petitioner asserted

that the agreement was modified orally. Uniroyal then asserted the defense of the statute of frauds of the state of New York, N.Y. General Obligation Law, §15-301(1) (McKinney, 1989). Petitioner asserts that Uniroyal is estopped from asserting the statute of frauds and the contract provision as defenses.

Uniroyal filed a Motion for Summary Judgment which was granted by the U.S. District Court for the Eastern District of Pennsylvania. The District Court held that there was no evidence of record to support the Petitioner's allegation that Uniroyal improperly delayed the consummation of the Kalo transaction in an effort to deprive Petitioner of his finder's fee. Further, the court held that the Petitioner's conduct was not inconsistent with the agreement as written, a prerequisite under New York law to the application of estoppel.

Petitioner appealed to the U.S. Court of

Appeals for the Third Circuit asserting that the District Court erred in holding that the case was governed by a promissory estoppel rather than equitable estoppel. The Third Circuit Court of Appeals held that no reasonable jury could conclude that Petitioner's Reliance which consisted exclusively of forbearance from acting was unequivocally referable to the alleged modification.

Petitioner filed this Writ of Certiorari asserted that he was deprived of his constitutional right to a trial by jury when the District Court granted Uniroyal's Motion for Summary Judgment.

It must be noted that Uniroyal specifically denies that any oral modification of the written agreement occurred. However, the District Court and the Third Circuit accepted that allegation as true for the purposes of summary judgment.

Pursuant to Rule 15 of the Rules of the

Supreme Court of the United States, the following are misstatements of fact and the law included in Petitioner's Petition for a Writ of Certiorari. There is no evidence in the record that the Petitioner is a leading authority on corporate acquisitions. On the contrary, the Petitioner appears to be a rather unsuccessful "finder." Petitioner has filed at least seven lawsuits against seven companies, in the Eastern District of Pennsylvania, seeking finder's fees based on alleged contracts with Defendants. See *Gackenbach vs. Dexter Hysol Corp.*, No. 90-7235 (E.D.Pa.); *Gackenbach vs. Nalco Chemical Company*, No. 84-5869 (E.D.Pa.); *Gackenbach vs. The UpJohn Company*, No. 82-5448 (E.D.Pa.); *Gackenbach vs. Morton-Norwich Products, Inc.*, No. 82-5408 (E.D.Pa.); *Gackenbach vs. A.H. Robbins Corp.*, No. 79-4722 (E.D.Pa.); and *Gackenbach vs. Stauffer Chemical Corp., et al.*, No. 79-2366 (E.D.Pa.). The Petitioner's self-important

and self-indulgent article attached to his Petition is not authenticated nor included in the record in the proceedings in the courts below.

Other than Petitioner's own conjecture, there is no evidence that any meeting arranged by Petitioner ultimately led to a decision by Uniroyal to purchase Kalo's seed treatment business. There is no evidence in the record, other than Petitioner's own self-serving speculation, that Uniroyal representives intentionally misled the Petitioner in advising him that there was no interest in the acquisition of Uniroyal.

REASONS FOR DENYING THE WRIT

1. Petitioner has identified no relevant factors indicating a special or important reason for granting a Writ. The Rules of the Supreme Court of the United States at Rule 10 lists the character of reasons that would be considered in granting

a Writ. The Petitioner has not identified a conflict between the Third Circuit Court of Appeals' ruling in this case and any other Court of Appeals' ruling. The Third Circuit has not decided a federal question in a way in conflict with that of a state court of last resort. There is no claim that the Third Circuit or the District Court has departed from the accepted and usual course of judicial proceedings which would warrant the exercise of this court's powers of supervision.

This is not a case where a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort. The Petitioner does not argue that the Third Circuit or the District Court decided an important question of federal law which has not been, but should be, settled by this court or has decided a federal question in a way that conflicts with applicable decisions

of this court.

Petitioner merely asserts that the District Court and the Third Circuit Court of Appeals misapplied the doctrine the doctrine of equitable estoppel to the defense of the statute of frauds as those concepts apply to his individual circumstances. As can be gleaned from Mr. Gackenbach's Petition, he asserts that he was denied his constitutional right to a jury trial because the District Court and the Third Circuit Court of Appeals determined that there were no facts of record which would support his claim that Uniroyal was equitably estopped from raising the statute of frauds in defense of his allegation of an oral contract. Two courts have already decided that Petitioner cannot prove his case. The Petitioner has alleged no facts, other than his own speculation, to demonstrate that Uniroyal intentionally delayed the acquisition of Kalo Company for the purpose of cheating the Petitioner out of

a commission. Similarly, the Petitioner cannot prove that his forbearance from identifying Kalo as a potential for acquisition to other companies was unequivocally referable to the alleged oral modification of the agreement.

Petitioner has simply not alleged special and important reasons which would warrant review of this case by this Honorable Court.

2. The District Court properly granted and the Third Circuit Court of Appeals properly upheld the entry of Summary Judgment in favor of Uniroyal.

Summary Judgment shall be rendered "forthwith if the pleadings, depositions, Answers to Interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.C.P. Rule 56(c). To avoid summary

judgment, the non-moving party must establish the existence of a genuine issue for trial and must demonstrate the existence of evidence sufficient to support a jury finding in its favor. *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

At the conclusion of discovery, Uniroyal moved for Summary Judgment on the basis that Petitioner was seeking to enforce an oral modification of a written contract which specifically precluded such oral modification and which oral modification violated the New York statute of frauds. (It must be noted that the agreement at issue specifically stated that its terms and conditions would be interpreted according to New York law.)

Under New York law, "a written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom

enforcement of the change is sought." N.Y. Gen. Oblig. law §15-301(1) (McKinney, 1991). Petitioner sought to avoid this statute of frauds by raising the doctrine of equitable estoppel. Under New York law, a party to an oral agreement can avoid the statute of frauds by proving one of two exceptions to the general rule prohibiting oral modifications where the agreement requires writing. First, an oral modification may be enforced when there has been a partial performance of the agreement to modify, as long as performance is unequivocally referable to the oral modification. *Rose vs. Spa Realty Associates*, 42 N.Y. 2d 338, 343, 397 N.Y.S. 2d 922, 926, 366 N.E. 2d 1279, 1283 (1977). Also a party may be estopped from invoking the statute of frauds when the other party has been induced to rely upon the alleged oral modification. *Towers Charter and Marine vs. Cadillac Insurance Company*, 894 F.2d 516 (2d Cir. 1990). The conduct

that allegedly was induced by the oral modification must be unequivocally referable to the modification. Further, the conduct induced by the modification or in partial performance of the agreement to modify must be inconsistent with the agreement as written. Id.

The terms of the original agreement provided for a finder's fee only if consummation of an acquisition occurred within twenty-four months from the date upon which the target was identified by the Petitioner. It is undisputed that Gustafson acquired portions of Kalo thirty-one months after it was originally identified to Uniroyal by the Petitioner. Hence, the Petitioner's claim that the agreement was orally modified to extend beyond the original twenty-four month period.

Petitioner asserts that in reliance upon the oral statement that he would receive the finder's fee no matter when the Kalo

acquisition was consummated, he did not attempt to expedite the acquisition and did not attempt to find other potential buyers for Kalo Company. The Petitioner asserts that the question of whether this conduct is unequivocally referable to the oral modification and inconsistent with the written agreement is for a jury.

As the District Court concluded, "There is absolutely no evidence of record of any specific actions that would have or could have been taken by Plaintiff to expedite the consummation of the transaction. . ." *Gackenbach vs. Uniroyal*, No. 90-2544 (E.D.Pa., March 6, 1992) at Appendix "B12."

Similarly, Petitioner's inaction in response to the alleged oral modification could not be unequivocally referable to the modification. As the Third Circuit Court of Appeals stated, "It would not have been per se unreasonable or illogical for someone in Gackenbach's position, but under the

subjective belief that the contract as originally written governed the situation, to have done what Gackenbach did, i.e., nothing. That would have meant accepting the fact that a particular deal had not worked out as hoped, but would not have been objectively unreasonable under the circumstances. Any engaged in Gackenbach's trade, that of a broker or finder, undoubtedly must expect some percentage of the potential deals he invests time and effort in promoting never to be consummated, or never to be consummated under circumstances entitling the middle man to a fee. Therefore, no jury could reasonably find Gackenbach's forbearance from action "not otherwise compatible to the agreement as written." *Gackenbach vs. Uniroyal*, No. 92-1257 (C.A. 3d Pa., September 22, 1992.) at Appendix "A6."

Neither Petitioner's alleged forbearance to identify the Kalo Company to other prospective purchases after the expiration of

the twenty-four month agreement for his inaction to expedite this acquisition, are, as a matter of law, unequivocally attributable to an alleged oral modification. Petitioner's inaction was consistent with the terms of the written agreement.

Petitioner was not denied a right to a jury trial. The District Court and the Third Circuit Court of Appeals properly concluded that Petitioner had no facts which could sustain a jury verdict in his favor and properly granted and affirmed the grant of Summary Judgment in Uniroyal's favor.

CONCLUSION

For the foregoing reasons, Uniroyal respectfully requests that this Honorable Court deny Myron Gackenbach's Petition for Writ of Certiorari.